SUPREME COURT. U. S.
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Supreme Court of the United States

OCTOBER TERM, 1958

No. 117

In the Matter of the ESTATE OF DAISY WARE BEACH, Osage Allottee No. 719, Deceased.

GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian, and JOHNNIE MOHON, as legal guardian of GLADYS NAOMI WARE, an incompetent person, *Petitioners*,

v.

BERNARD E. BEACH.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

APPENDIX

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPENDIX

Statutes Involved

Act of April 18, 1912, 37 Stat. 86, 88:

Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust

funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided,* That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

Act of Feb. 27, 1925, 43 Stat. 1008, 1011 (25 U.S.C. § 331 note):

Sec. 7. Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: *Provided,* That this section shall not apply to spouses under existing marriages.

Act of Sept. 1, 1950, 64 Stat. 572 (25 U.S.C. § 331 note):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011), which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section after the comma following the word "*Provided*" and inserting in lieu thereof the following: "That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. *Provided further,* That this section shall not apply to spouses under marriages existing on February 27, 1925."

Rules of Supreme Court of Oklahoma

Rule 28

REHEARINGS

(1) Applications for a rehearing in any cause, unless otherwise ordered by the Court, shall be made by petition to the Court, signed by counsel, and filed with the Clerk, within fifteen (15) days from the date on which the opinion in the cause is filed. No oral argument on petition for rehearing shall be allowed except upon order of the Court. No motion or application for rehearing or review will be allowed after the denial of a petition for rehearing without leave of Court. The Clerk shall not file any such motion or application except by leave of the Court first obtained. No petition for rehearing shall be filed or considered without proof of service.

Rule 29

APPLICATION FOR SECOND PETITION FOR REHEARING

(1) Within five days (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and a brief in support thereof.

Rule 33

MANDATE AND ISSUANCE

(1) After the expiration of fifteen (15) days from the filing of an opinion proper mandate to the trial court may issue; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied the mandate shall not be issued and transmitted until the

expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of.

(2) If such application for a second petition for rehearing is denied, the mandate may issue.

(3) All mandates shall be issued by the Clerk on order of the Chief Justice.

No. 5655

Petition for Probate of Will

STATE OF OKLAHOMA } IN COUNTY COURT
OSAGE COUNTY }

In the Matter of the Estate of Daisy Ware Beach, Osage Allottee No. 719, Deceased.

COMES Now Bernard Beach and shows to the Court; That Daisy Ware Beach departed this life at Pawhuska, Oklahoma on or about the 18th day of May, 1949, that said decedent at the time of his death was a resident of Osage County, State of Oklahoma; that said decedent left estate in the County of Osage, State of Oklahoma, the general character and probable value of which is hereinafter stated; that said decedent left a Will bearing the date of about the 20 day of August, 1946 which petitioner alleges to be the last Will and Testament of said deceased, and which is herewith presented for probate; that Jesse J. Worten the person named in said Will as executor is dead.

That Paul A. Comstock for whom letters of administration with the will annexed, are prayed herein is a resident of Osage County, State of Oklahoma, his post office address being Pawhuska, Oklahoma.

That the names, ages and residence of the heirs and devisees of decedent so far as known to petition are as follows:

Name	Age	Residence P.O.
Bernard Beach, husband,	adult	Pawhuska, Oklahoma
Ted Hazelbaker, adopted son,	adult	Fairfax, Oklahoma
Gladys Ware, sister,	adult	Okla. Hospital, Vinita, Oklahoma
Charles Frank Ware, Jr., nephew,	minor	Ponca City Military Academy, Ponca City, Okla.
Juanita Ware West,	adult	1303 North Vandalia, Tulsa, Oklahoma
Edith Ware Crawford,	adult	412 E. 15, Pawhuska, Oklahoma
Wahlelle Ware Morse	adult	1101 E 37th Place, Tulsa, Oklahoma

The general character and probable value of said estate is as follows:

surplus cash, trust funds, securities, headright interests, and real estate in excess of $40,000.00.

Election to Take.

Your petitioner, Bernard Beach, is the surviving husband of Daisy Ware Beach, Osage Allottee No. 719, deceased, and reserves the right to elect to take that portion of her estate which would come to him as such surviving husband under the law of succession of the state of Oklahoma and hereby asserts said right and announces his election to take that portion of the estate of said decedent which would be his as such surviving husband under the law of succession of the state of Oklahoma.

Wherefore, petitioner prays that upon hearing hereof said Will be admitted to probate and letters of ad-

ministration with the will annexed issued to said Paul A. Comstock.

BERNARD E. BEACH
Petitioner

Filed Apr 6, 1950

Order Admitting Will to Probate

Now on this 1st day of May, 1950, this matter came on for hearing in regular order upon the petition for probate of will and for the appointment of Johnnie Mohon as administratrix with the will annexed, filed herein by Johnnie Mohon, guardian of Gladys Naomi Ware, and upon the petition of Bernard Beach, the surviving husband, for probate of the will and for the appointment of Paul A. Comstock as administrator with the will annexed, and Johnnie Mohon, guardian of Gladys Naomi Ware, appearing in person and by her attorney, Frank W. Files, and Bernard Beach appeared in person and by his attorneys, Paul A. Comstock and Gray & Palmer, and the court having heard the evidence, and the argument of counsel, and the hour of adjournment being at hand takes said matter under advisement until the 2nd day of May, 1950.

Now on this 2nd day of May, 1950, said matter coming on for decision, and the court being fully advised in the premises, finds:

1. That notice of hearing on the petitions for probate of will were given by posting notices in three public places in Osage County, Oklahoma, and by mail to each and all of the heirs at law and legatees and devisees named in said will, as required by law and by order of the court, and that the hearings on said petitions were duly and regularly continued by order of this court from the 19th to the 20th day of April, and from the 20th day of April to the 1st day of May, 1950.

2. That Jesse J. Worten who was named in said will to act as executor is dead, and that an administrator with the

will annexed should be appointed to administer upon said estate.

3. That the instrument propounded for probate was duly executed by the decedent, and that at the time of the execution thereof said testator was of full age, of sound mind and memory, and was not acting under duress, menace, fraud or undue influence, and that said will was executed in all particulars as required by law, and should be admitted to probate.

4. That Bernard Beach, the surviving husband, has the absolute right to the appointment as administrator, or to nominate the administrator herein, and that his nominee, Paul A. Comstock, should be appointed as administrator with the will annexed.

IT IS THEREFORE, ordered, adjudged and decreed by the court that said instrument be admitted to probate as and for the Last Will and Testament of the said Daisy Ware Beach, deceased, and that the same be and hereby is established as a valid will, passing both real and personal estate, and that Paul A. Comstock be, and he is hereby appointed as the administrator with the will annexed upon his taking and subscribing to the oath of office required by law, and executing a bond to the State of Oklahoma in the penal sum of Two thousand dollars and upon approval thereof as required by law.

To the order appointing Paul A. Comstock as administrator Johnnie Mohon, guardian of Gladys Naomi Ware, excepts and exception is allowed.

(sgd) L. F. ROBERTS
County Judge (SEAL)

O.K. PAUL A. COMSTOCK
GRAY & PALMER
Attorneys for Bernard Beach

O.K. as to form (sgd) F. W. FILES
Attorney for Johnnie Mohon, Guardian of Gladys Naomi Ware.

Filed May 2 1950

Petition for Determination of the Heirs

Come now Paul A. Comstock, administrator with the will annexed of the estate of Daisy Ware Beach, Osage Allottee No. 719, deceased, and Bernard Beach, the surviving husband of said decedent, and state to the court.

1. That said decedent died on the 18th day of May, 1949, leaving a will by the terms of which she left to her surviving husband the sum of $1.00 and to her son Theodore Hazelbaker the sum of $1.00, and the remainder of her estate to her sister Gladys Naomi Ware, and that the said surviving husband has filed his election to take under the law of descent and succession instead of under the will of decedent.

2. That the decedent died seized and possessed of the real estate, cash, securities, trust funds, personal property and 2.50011 Osage headrights as set forth in the inventory and appraisement on file in the above entitled matter, and left surviving her as her sole and only heirs at law her surviving husband, Bernard Beach, and her son Theodore Hazelbaker.

WHEREFORE, these applicants pray that the heirs of the said Daisy Ware Beach be determined, and that distribution of the assets of her estate be made in accordance with such determination.

(sgd) PAUL A. COMSTOCK
Administrator with the Will annexed.

(sgd) BERNARD E. BEACH
Surviving husband of Daisy Ware Beach

Filed Jul 16, 1951

Answer to Petition for Determination of Heirs

Come now Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, legal guardian of Gladys Ware, and for answer to the petition for determination of heirs filed in said cause on July 16th, 1951, by Paul A. Comstock, administrator with will annexed of said estate, and Bernard E. Beach, surviving husband of Daisy Ware Beach, allege and state:

1. That Daisy Ware Beach at the time of her death was a restricted full blood member of the Osage Tribe of Indians, her allotment number being 719; that said decedent had never been granted a certificate of competency; that all real estate owned by the decedent at the time of her death and all cash and securities held by and under the supervision of the Secretary of the Interior and the mineral interest or headrights owned by the decedent at the time of her death are all restricted and subject to the laws of the United States of America applicable to members of the Osage Tribe of Indians.

2. That Daisy Ware Beach and Bernard E. Beach were married subsequent to February 27th, 1925.

3. That Section 7 of the Act of Congress approved February 27, 1925, provides as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: Provided, That this section shall not apply to spouses under existing marriages."

That the above mentioned Section of the Act of February 27, 1925, was amended by the Congress of the United States of America, which said amendment was approved September 1, 1950, and is in words and figures as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That section 7 of the Act of February 27, 1925 (43 Stat. 1008, 1011) which imposes an inheritance restriction with relation to lands and funds of the Osage Indians, is amended by striking out the portion of said section after the comma following the word "Provided" and inserting in lieu thereof the following: "That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) No claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States and is enrolled on a membership census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. Provided further, That this section shall not apply to spouses under marriages existing on February 27, 1925."

4. That the said Bernard E. Beach, husband of said decedent, has never filed a formal pleading herein alleging that he is of Indian blood.

5. That by reason of the foregoing allegations the said Bernard E. Beach is precluded by law from succeeding to any part of said estate unless he establishes that he is a citizen of the United States and is of Indian blood and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal ancestor so enrolled.

WHEREFORE, having fully answered, Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, legal guardian of Gladys Ware, pray that said estate be distributed in accordance with the provisions of the will of said deceased.

F. W. FILES
Attorney for Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, legal guardian of Gladys Ware

Filed Mar 24 1952

Excerpts From Transcript of Testimony

The Court: That if he had the right it came into effect immediately upon her death?

Mr. Gray: That is our position, yes, sir, that he had already inherited.

Mr. Files: Mr. Gray's contention might have been true had she died intestate but she died testate and left a will.

* * *

C-M 1255 By Mr. Gray:

Q. You may state your name.
A. Bernard Beach.
Q. Bernard, you and Daisy Ware were married?
A. Yes sir.
Q. When?
A. August 19th, 1934.

C-M 1257 By Mr. Files:

Q. Mr. Beach, your wife was an allotted member of the Osage Tribe?
A. Yes sir.
Q. And she was a restricted Indian, wasn't she?
A. Yes sir.

Order Approving Final Account of the Administrator: Determining the Heirs and Directing Distribution of Estate

Now on this 3rd day of December, 1952, this matter came on for hearing upon the final account of Paul A. Comstock, administrator with will annexed of the estate of Daisy Ware Beach, Osage Allottee No. 719, deceased, and upon the petition for determination of the heirs and for distribution of the estate of decedent, and for a widower's or family allowance to Bernard Beach, the surviving husband of the decedent, and upon the election of the surviving husband, Bernard Beach, to take a husband's share of the estate under the law of the State of Oklahoma, and said administrator appeared in person and by his attorneys,

Gray & Palmer, and Bernard Beach appeared in person and by his attorneys, Paul A. Comstock and Gray & Palmer, and Gladys Naomi Ware appeared by her guardian, Johnnie Mohon, and by her attorney, Frank W. Files, and Johnnie Mohon, guardian of Gladys Naomi Ware, appeared in person and by her attorney, Frank W. Files, and the court having heard all of the evidence and the argument of counsel and upon consideration thereof, finds:

1. That due and legal notice of the hearing on the final account of the administrator with will annexed, and on the petition for determination of the heirs and for distribution of the estate of decedent was given as required by law, both by publication of the notice for the required length of time in the Osage County News, a newspaper published weekly and of general circulation in Osage County, Oklahoma, and by posting notice in three public places in Osage County, Oklahoma, one of which said notices was posted at the front door of the court house in the City of Pawhuska, Oklahoma, all as required by law. That said notice was also duly served upon the Superintendent of the Osage Agency at Pawhuska, Oklahoma.

2. That due and legal notice to creditors was given *as* as required by law, and that the time for filing claims against said estate has long since expired, and that all claims against said estate have been fully paid and satisfied, and there are no suits pending against said estate.

3. That all federal and state estate taxes, and income taxes, and all ad valorem or municipal taxes have been paid and there are no taxes due and owing by said estate.

4. That the hearing on the above matters was originally set for the 15th day of August, 1951; and that continuances have been legally and properly made from said time up until this date by regular orders of this court.

5. That this court has read a transcript of the record and a transcript of the testimony, and heard evidence, and is fully advised in the premises.

6. That the final report of the administrator filed on July 16, 1951, and the supplemental report filed on April 2, 1952, show total receipts in the sum of $8,456.68, and disbursements in the sum of $8421.18, leaving a balance of cash on hand of $35.50; and that said administrator has received and expended the additional sum of $756.01 since the time of the filing of the supplemental report, making a total received in the sum of $9,212.69, and a total disbursement of $9177.19, leaving a balance of cash on hand in the sum of $35.50.

7. That the report of the administrator is true and correct and should be approved and allowed.

8. That the administrator soon after his appointment had an inventory made of all the assets of the estate of said decedent, to-wit:

Southeast quarter of Southwest quarter, of Section 15, Township 28, Range 6, appraised at	$1000.00
Lot 2 of section 4, Township 25, Range 8 appraised at	944.25
North half of Southeast quarter, and South half of Southeast quarter of Northeast quarter, and North half of Northeast quarter, and Southwest quarter of Northeast quarter, and Northwest quarter of Southeast quarter of Northeast quarter, and West half of Northeast quarter of Southeast quarter of Northeast quarter, of Section 23, Township 23, Range 11; appraised at	1850.00
Southeast quarter of Southwest quarter, of Section 34, Township 24, Range 9; appraised at	600.00
Southwest quarter, and Southwest quarter of Northwest quarter of Southeast quarter, and South half of Northwest quarter of Northwest quarter of Southeast quarter, of section 25, Township 23, Range 10, appraised at	$937.50
South half of Southwest quarter, of section 28, and North half of Northwest quarter, of section 33, Township 26, Range 8, appraised at	3800.00.
South half of Northwest quarter, and North half of Southwest quarter, of section 28, Township 26, Range 8, appraised at	8500.00

(Homestead) Lots 13, 14, 15, 16 block 43 of Prudom Addition to the City of Pawhuska, Oklahoma, appraised	5000.00
Furniture	654.50
Cash at Osage Agency	16451.62
Securities at Agency	4600.00
Trust funds at Agency	5853.18
2.50011 Osage Headrights	18750.83.

9. That the administrator with will annexed is entitled to the statutory fee in sum of $330.50 and is entitled to an additional fee of $330.54 for evtraordinary services, making a total of $661.08.

10. That Gray & Palmer, lawyers, have represented the administrator with will annexed and performed the duties as such attorneys and are entitled to be paid a fee for their services and that such fee amounts to $1732.21; and that said attorneys are entitled to an additional fee in the sum of $500.00 for extraordinary services rendered in defending an appeal taken to the Supreme Court of the State of Oklahoma, making a total of $2232.21.

11. That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on May 18, 1949, leaving as her next of kin and sole and only heirs at law her husband, Bernard Beach, and an adopted son, Theodore Eugene Hazelbaker, but that the said Bernard Beach is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of the restricted estate of his said deceased wife, and the adopted son has made no contest of the will of decedent, and the estate of decedent descends under the terms of said will, which is in words and figures as follows, to-wit:

"WILL. I Daisy Ware Beach, Osage Allottee No. 719, of Pawhuska, Oklahoma, being now in good health, strength of body and mind but sensible of the uncertainty of life and desiring to make disposition of my property and affairs while in health and strength, do hereby make,

publish and declare the following to be my last will and testament, hereby revoking and cancelling all other or former wills by me at any time made.

"First: I direct the payment of all my just debts and funeral expenses.

"Second: I give to my husband, Bernard E. Beach, the sum of One Dollar ($1.00).

"Third: I give to my son, Theodore Eugene Hazelbaker, the sum of One Dollar ($1.00).

"Fourth: All the rest and residue of my property, real and personal, of every kind and wherever situated, whether vested or contingent at the time of my death, I devise and bequeath to my sister, Gladys Naomi Ware.

"I further direct that my executor sell such of my property, both personal and real, as can be sold and that at the closing of my estate the funds derived from the sale thereof be deposited to the account of Gladys Naomi Ware at the Osage Indian Agency, to be disbursed by approval of the Secretary of the Interior to and for the benefit of Gladys Naomi Ware as her needs may require.

"Fifth: I hereby appoint and designate Jesse J. Worten sole executor of this, my last will and testament.

"I am not leaving my husband, Bernard E. Beach, and my son, Theodore Eugene Hazelbaker, a greater sum because of the fact that I feel that I have provided well for both of them during my lifetime.

"In witness whereof, I, Daisy Ware Beach, have to this my last will and testament, subscribed my name this 20 day of August, 1946, at Pawhuska, Oklahoma. Daisy Ware Beach."

(attestation omitted).

and that said will has been duly and regularly admitted to probate by the County Court of Osage County, Oklahoma,

and that the estate of decedent descended and vested in accordance with the terms thereof.

12. That the said Daisy Ware Beach died leaving no father or mother, and no child of a deceased child, and left as her sole and only heirs at law her surviving husband, Bernard E. Beach, and an adopted son, Theodore Eugene Hazelbaker, but that she died leaving a will and that her estate descends and vests in accordance with the terms of said will.

13. That the surviving husband, Bernard E. Beach, filed herein his election to take against said will and under the laws of the State of Oklahoma, but that the said Bernard E. Beach is not of Indian blood and under the Acts of Congress is entitled to inherit no portion of said restricted estate; and the son, Theodore Eugene Hazelbaker, has made no contest of the will of decedent, and the said estate of decedent descends under the terms of said will.

14. That the said Daisy Ware Beach, Osage Allottee No. 719, died seized and possessed of all of the real estate and property as above herein described in paragraph numbered 8, and that after the payment of the bequests of $1.00 each to the surviving husband and surviving son, all of the estate of decedent, whether described herein or not, descended to and became the property of Gladys Naomi Ware under the will of said decedent and that title to the same should be vested in her and said estate distributed to her.

15. That the said surviving husband, Bernard E. Beach, is not entitled to a widower's or family allowance from the funds of said estate.

16. That the balance of the court costs should be paid and upon distribution of said estate and payments of the fees and costs as herein directed said administrator be finally discharged.

17. That copies of all jurisdictional papers filed herein have been served upon the Superintendent of the Osage Agency.

IT IS, THEREFORE, ORDERED, adjudged and decreed by the court as follows:

That due and legal notice of this hearing was given as required by law, and that proper continuances were had by orders of this court from time to time until this date; and that due and legal notice to creditors was given as required by law, and that all claims against said estate have been fully paid and there are no suits pending against said estate.

That there are no federal estate or income taxes due or owing, and no State inheritance or income taxes due and owing and there are no ad valorem or municipal taxes due or owing by said estate.

That the final account of the administrator with will annexed, and the supplemental account, be, and are hereby approved and allowed, and said administrator with will annexed has properly accounted for all funds received by him.

That the administrator with will annexed soon after his appointment caused an inventory of the property of said estate to be made as required by law.

That the administrator with will annexed be and is hereby allowed the statutory fee of $330.50, and an additional fee of $330.54 for extraordinary services, or a total of $661.08 and he is authorized and directed to pay said fee.

That Gray & Palmer, attorneys for the administrator with will annexed, be and are allowed a fee for their services of $1732.21, and an additional fee of $500.00 for extraordinary services, of a total of $2232.21, and said administrator with will annexed is hereby authorized and directed to pay said fee.

That the administrator with will annexed pay the balance of the court costs due and owing.

That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on the 18th day of May, 1949, leaving as her sole and only heirs at law a surviving husband, Bernard E. Beach, and an adopted son, Theodore Eugene Hazelbaker, but leaving a will, which is hereinabove set out in full, under the terms of which, after payment of bequests of $1.00 to each the surviving husband and surviving adopted son, the entire estate of decedent, whether described herein or not, descended to and vested in Gladys Naomi Ware, the beneficiary named in the residuary clause of said will, and the said Gladys Naomi Ware is hereby declared and decreed to be the owner thereof, sand said estate is hereby distributed to her, including all of the real estate and property as above herein described in paragraph numbered 8.

That Bernard Beach, the surviving husband of decedent, is not of Indian blood and under the Act of Congress relative to the Osages is not entitled to inherit any portion of the restricted estate of said decedent; and the said Bernard Beach is not entitled to a widower's or family allowance from the estate of decedent.

That upon making the payments as herein ordered the said administrator and his bondsmen be fully and finally discharged.

To the finding and allowance of fees for extraordinary services to said administrator, and to his attorneys, the said Gladys Naomi Ware excepts.

To the finding and judgment of the court denying his right to inherit any portion of the estate of his deceased wife, and denying his right to receive a widower's or family allowance from said estate, the said Bernard Beach excepts, and gives notice in open court, in the presence of the court and in the presence of opposing counsel, of his

intention to appeal to the district court of Osage County, Oklahoma, and requests that the amount of appeal bond be fixed.

The Court thereupon fixes the amount of the bond upon appeal from the order denying the right to inherit from the estate at the sum of $100.00, and the bond upon the appeal from the order denying a widower's or family allowance at the sum of $100.00.

(sgd) E. H. MATTINGLY
County Judge

Filed Dec 9 1952

No. 19,694

IN THE DISTRICT COURT, OSAGE COUNTY, OKLAHOMA

In the matter of the Estate of Daisy Ware Beach, Osage Allottee No. 719, deceased.

Order Determining Heirs, Fixing Family Allowance, and Directing Distribution of the Estate

On the 5th day of January, 1954, this matter came on for trial de novo upon the application of the administrator with will annexed of the estate of Daisy Ware Beach, Osage Allottee No. 719, deceased, for determination of the heirs and for the distribution of the estate, and upon the application of Bernard E. Beach, the surviving husband, for a family or widower's allowance, and upon the election of the said surviving husband to take a husband's share of the estate under the law of descent and distribution of the State of Oklahoma, and the said administrator appeared in person and by his attorneys, Gray & Palmer, and Bernard E. Beach appeared in person and by his attorneys, Paul A. Comstock and Gray & Palmer, and Gladys Naomi Ware appeared by her guardian, Johnny Mohon and by her attorney, Frank W. Files, and Johnny Mohon, guardian of Gladys Naomi Ware appeared in person and by her at-

torney, Frank W. Files, and thereupon the court proceeded to hear the evidence and argument of counsel and the trial not being completed it was continued from day to day until the 13th day of January, 1954, and on said 13th day of January, 1954, the evidence was completed and all parties rested, and the matter was continued for argument to the 25th day of January, 1954, and on the 25th day of January, 1954, argument was had and the court took the matter under advisement and continued it to the 27th day of January, 1954.

Now on this 27th day of January, 1954, all parties being present as heretofore, and the court being fully advised in the premises and upon consideration thereof, finds:

1. The issues generally in favor of the surviving husband, Bernard E. Beach.

2. That Allen W. or A. W. Comstock, the grandfather of Bernard E. Beach, was of Indian blood and that Bernard E. Beach is of Indian blood and is, under his election to take under the laws of descent and distribution of the State of Oklahoma, entitled to and did inherit one-half of the estate of the said Daisy Ware Beach, Osage Allottee No. 719, deceased.

3. That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on the 18th day of May, 1949, and left as her next of kin and sole and only heirs at law her husband, Bernard E. Beach, and an adopted son, Theodore Eugene Hazelbaker, but that the said Daisy Ware Beach left a will which devised and bequeathed to said adopted son, Theodore Eugene Hazelbaker only $1.00, and that said adopted son has made no contest of the will of said decedent, and that her estate descends one-half to the surviving husband, Bernard E. Beach, under the laws of the State of Oklahoma, and one-half under the terms of the will of decedent, which is to say $1.00 to Theodore Eugene Hazelbaker and the re-

mainder to Gladys Naomi Ware, the surviving sister of said decedent, after the deduction of the said bequest of $1.00 to the adopted son.

4. That the said decedent died leaving no father or mother and no child or child of a deceased child, and left as her sole and only surviving heirs at law her husband, Bernard E. Beach, and her adopted son, Theodore Eugene Hazelbaker, but that she left a will and her estate descends under the will of decedent and under the election of the surviving husband to take under the laws of the State of Oklahoma, as hereinabove found.

5. That the surviving husband, Bernard E. Beach, was at the time of the death of the said Daisy Ware Beach, and is at this time, without property and that he is entitled to a widower's or family allowance from the funds belonging to said estate from the date of the death of the said Daisy Ware Beach and that $100.00 a month is a fair and reasonable allowance and that the same should be allowed to him.

It Is, Therefore, ordered, adjudged and decreed by the court as follows:

That Bernard E. Beach, the surviving husband of Daisy Ware Beach, Osage Allottee No. 719, deceased, is of Indian blood and is, under his election to take under the laws of descent and distribution of the State of Oklahoma, entitled to and did inherit one-half of the estate of the said decedent.

That Bernard E. Beach, the surviving husband of the decedent, Daisy Ware Beach, is entitled to receive a widower's or family allowance from the date of the death of said decedent of $100.00 a month, and such allowance is hereby granted and allowed to him from the funds belonging to said estate.

That Daisy Ware Beach, Osage Allottee No. 719, died testate in Osage County, Oklahoma, on the 18th day of

May, 1949, leaving as her sole and only heirs at law her surviving husband, Bernard E. Beach, and her adopted son, Theodore Eugene Hazelbaker, but leaving a will, and that her estate descends one-half to Bernard E. Beach, the surviving husband, under his election to take under the laws of the State of Oklahoma, and the remaining one-half passes under the will and by the terms of said will $1.00 to Theodore Eugene Hazelbaker and the remainder of said one-half to Gladys Naomi Ware, and that the said Bernard E. Beach be and is hereby declared and decreed to be the owner of one-half of the estate of said decedent, and Gladys Naomi Ware be and is hereby declared and decreed to be the owner of the remaining one-half of the estate of said decedent, after the payment of $1.00 to Theodore Eugene Hazelbaker.

That Daisy Ware Beach left no child or child of a deceased child, and no father or mother, and left no other heirs at law except as above set forth, and that no other person has any right, title or interest in and to her estate.

It is further ordered that this case be, and is hereby remanded to the County Court of Osage County, Oklahoma, with directions to carry out the Judgment herein rendered.

To all of which findings and judgment of the court the said Gladys Naomi Ware, and Johnny Mohon, guardian of Gladys Naomi Ware, except and exceptions are allowed.

(sgd) HUGH C. JONES
District Judge.

Filed Feb 15, 1954

[Filed June 25, 1957.]

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 36,581

GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian ,and JOHNNIE MOHON, as legal guardian of Gladys Naomi Ware, an incompetent person, *Plaintiffs in Error,*

vs.

BERNARD E. BEACH, *Defendant in Error*

Syllabus

1. The amendatory Act of Congress of September 1, 1950, (64 Stat. 572) restricting inheritance from those who are of one-half or more Osage Indian blood to heirs of Indian blood who are citizens of the United States and are enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or have a lineal Indian ancestor so enrolled, does not apply where the death of the Osage Indian occurred in 1949 and the right of inheritance had already vested in a statutory heir of Indian blood who was not enrolled and had no enrolled lineal Indian ancestor. The right of inheritance in such case is controlled by the Act of Congress of February 27, 1925, (43 Stat. 1008), which was the substantive law pertaining to such inheritance in effect at the time of the death of such Osage Indian and which act only required such heir to be of Indian blood and did not require such heir to be a citizen and either enrolled or to have an enrolled lineal Indian ancestor.

2. The rule as to proof of race-ancestry is not so strict as the rule as to proof of pedigree which confines evidence of reputation to "general repute in the family", and proof of the general reputation in the community concerning the race of a member of the community is competent evidence on the question of race-ancestry.

3. Evidence of declarations of a deceased person, made during his lifetime, concerning his race, is admissible on the question of race-ancestry.

4. Record examined and held that finding of trial court that surviving husband of deceased Osage Indian was of Indian blood, and therefore entitled to inherit statutory portion of estate, was not against the clear weight of the evidence.

5. Admission of incompetent evidence in a cause of equitable nature tried to the court is not ordinarily reversible error where the judgment is not clearly against the weight of the evidence and it does not appear that the complaining party has been in any way prejudiced by the admission thereof.

6. The granting of a family allowance during the pendency of administration proceedings is exclusively the creature of statute. The controlling statute in such case is 58 O.S. 1951, § 314, which provides for an allowance for the support of the surviving spouse, without regard to whether such surviving spouse be the wife or the husband.

7. The amount of allowance for support of a decedent's family during the pendency of administration proceedings rests largely within the discretion of the county court and of the district court when tried de novo on appeal, and unless such discretion has been abused its action will not be disturbed.

Appeal From The District Court of Osage County, Oklahoma

Hon. Hugh C. Jones, *Judge.*

Appeal From Decree Determining Heirs and Distributing Estate of Deceased Osage Indian and From Order Granting Family Allowance to Surviving Husband From Such Estate.

AFFIRMED

F. W. FILES,
Pawhuska, Oklahoma, For Plaintiffs in Error

CHAS. R. GRAY, W. N. PALMER,
PAUL A. COMSTOCK,
Pawhuska, Oklahoma, For Defendant in Error.

WILLIAMS, J:

Daisy Ware Beach, Osage allottee No. 719, died on May 18, 1949. At the time of her death she was survived by her husband, Bernard Beach, to whom she had been married since August 19, 1934, an adopted son, Theodore Eugene Hazelbaker, and a maiden sister Gladys Naomi Ware, an incompetent person. Decedent left a will dated August 20, 1946, under the provisions of which all of her property was devised and bequeathed to her incompetent sister, Gladys Naomi Ware, with the exception of $1.00 which was bequeathed to her husband, and $1.00 to her adopted son.

On April 6, 1950, the surviving husband, Bernard Beach, filed his petition for probate of said will, and at the same time filed his election to take that portion of the estate which would be his as such surviving husband under the statutes of descent and distribution of the State of Oklahoma rather than under the will. The guardian of Gladys Naomi Ware challenged the husband's right to elect to take under the law on the grounds that he was not of Indian blood and, therefore, could not inherit his wife's Osage estate under the Osage Acts of Congress. It should be here noted that the entire estate of Daisy Ware Beach, deceased, consisted of restricted lands, moneys and headrights, or mineral interests, of a total value of some $68,000.

Upon a hearing being held in the matter, the county court determined that Bernard Beach was not of Indian blood and was therefore not entitled to inherit and was

not entitled to a widower's or family allowance from the estate of descent and entered a decree of distribution accordingly. Beach appealed to the district court where, after a trial de novo, judgment was rendered reversing the county court, and determining that Beach was of Indian blood and was therefore entitled to inherit and to a widower's allowance. This appeal from such judgment of the district court has been perfected by Johnnie Mohon as guardian of Gladys Naomi Ware, an incompetent person, hereinafter referred to as plaintiff in error.

As her first proposition of error, plaintiff in error contends that Bernard Beach, husband of Daisy Ware Beach, deceased, cannot succeed to any part of the estate of his wife since his purported proof of Indian blood wholly fails to meet the requirements of the Act of Congress approved September 1, 1950.

The Act of Congress of February 27, 1925 (43 Stat. 1008) dealt with restrictions with relation to lands and funds of the Osage Indians. Section 7 of such Act provided as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interest of the Osage Tribe: Provided, That this section shall not apply to spouses under existing marriages."

This section was in effect at the time of the marriage of Daisy Ware Beach and Bernard Beach in 1934, at the time of the death of Daisy Ware Beach in 1949, and at the time Bernard Beach filed his election to take under the law rather than under the will on April 6, 1950. Such section was amended, however, on September 1, 1950, by Act of Congress of that date, (64 Stat. 572), so that as amended such section now provides as follows:

"Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage Tribe: Provided, That (except in cases where a person claiming as such heir is a party to judicial proceedings pending on the date of the enactment of this proviso in which the claimant has filed a formal pleading alleging Indian blood) no claim of heirship shall be recognized unless the claimant shall establish that he is a citizen of the United States, and is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior, or has a lineal Indian ancestor so enrolled. Provided further that this section shall not apply to spouses under marriages existing on February 27, 1925."

Since Beach admittedly did not establish that he is enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior or has a lineal ancestor so enrolled, as required by the amendment of September 1, 1950, relied upon by plaintiff in error, the question actually presented by the first proposition is whether such amendment is applicable to the instant case.

Plaintiff in error contends that the amendment of September 1, 1950, merely established a rule of evidence and that a statute which applies to procedure only is given a retrospective effect, unless it appears that the Legislature intended it should operate prospectively only; that Congress obviously intended such amendment to be retrospective in application else it would not have inserted the clause referring to pending proceedings in which a claimant had filed a formal pleading alleging Indian blood; that Bernard Beach had not filed a formal pleading alleging that he was of Indian blood at the time of the adoption of such amendment and that such amendment was therefore applicable to this case.

We are unable to subscribe to plaintiff in error's theory that the 1950 amendment merely prescribed an exclusive method of proving Indian blood and was therefore a rule of evidence rather than substantive law.

There are many persons who are undeniably of Indian blood who are not enrolled on any roll prepared under the direction of the Secretary of the Interior and who have no lineal ancestor so enrolled. On the other hand, many intermarried whites and negro freedmen were made members of the various Indian tribes and were enrolled on the tribal rolls even though not a single drop of Indian blood flowed through their veins. Obviously, then, the possession of Indian blood and the appearance of the name on the rolls above referred to are not synonymous, and the proof of one would not constitute proof of the other. Under the Act of 1925, supra, as it existed prior to the 1950 amendment, any heir of Indian blood, regardless of the quantum or source thereof, and regardless of the citizenship of such heir and whether such heir were enrolled or unenrolled, could inherit from a restricted Osage Indian. See In re Ham's Estate, 186 Okl. 610, 99 P. 2d 895. By virtue of the amendment of 1950, supra, however, only those heirs of Indian blood who are citizens of the United States and who are enrolled on a membership, census, or other roll prepared under the direction of the Secretary of the Interior or have a lineal Indian ancestor so enrolled, can inherit from a restricted Osage Indian. Such amendment simply denies non-citizen heirs of Indian blood and unenrolled heirs of Indian blood the right to inherit from an Osage Indian. Since such heirs could and did inherit prior to such amendment, the same constituted a change in the substantive law rather than mere procedure.

It is well established in this jurisdiction that property descends upon death and vests immediately in the heirs, legatees and devisees, subject only to control of the county court for purposes of administration. 84 O.S. 1951, § 212;

84 O.S. 1951, § 175; Seal v. Banes, 168 Okl. 550, 35 P. 2d 704; Parks v. Lefeber, 162 Okl. 265, 20 P. 2d 179; 86 A.L.R. 392. Since one has a vested right in property to which he succeeds under the law of descent and distribution or under the will of a decedent immediately upon the death of the decedent, it follows that an estate must be distributed among heirs and distributees according to the law as it exists at the time of death of the decedent. 16 Am. Jur. 782 and 786, Descent and Distribution, §§ 15 and 20.

We are therefore of the opinion and hold that the right of Bernard Beach, as surviving spouse, to succeed to his statutory share of the estate of Daisy Ware Beach, deceased, vested immediately upon the death of Daisy Ware Beach in 1949, and is controlled by the substantive law pertaining thereto as it existed at that time, namely, the Act of Congress of February 27, 1925, above quoted, as it existed prior to the 1950 amendment, supra. The amendment of September 1, 1950, is not applicable to this case, and the trial court did not err in so holding.

As her second proposition, plaintiff in error contends that the admission of testimony that the general reputation of A. W. Comstock was of Indian blood was erroneous and was prejudicial and that the admission of statements by A. W. Comstock to various persons stating that he was of Indian blood was erroneous and prejudicial.

A. W. Comstock was the grandfather of Bernard Beach. Obviously, if A. W. Comstock was of Indian blood, his grandson, Bernard Beach, would likewise be of Indian blood, although of small quantum. A number of witnesses testified as to the general reputation in the community of A. W. Comstock as being of Indian blood. It is such testimony that plaintiff in error contends is incompetent and the rule set out in Frank v. Harjo, 142 Okl. 157, 286 P. 14, to the effect that in cases involving pedigree, the general rule is that general repute, in the family only and

not the common reputation in the community, is admissible to prove pedigree, is cited in support thereof. The rule and cases cited by plaintiff in error are correct, but are not applicable here. The question here involved is, strictly speaking, race or race-ancestry rather than pedigree. The rule as to proof of race ancestry is not so strict as the rule as to proof of pedigree. Evidence as to the general reputation in the community concerning the race of a member of the community is competent. 20 Am. Jur. 416, Evidence, § 475; Cole v. District Board, 33 Okl. 692, 123 P. 426; White v. Holderby, 192 F. 2d 722; State v. Miller, (N.C.) 224 N.C. 228, 29 S.E. 2d 751; Gilliland v. Board of Education (N.C.) 141 N.C. 482, 54 S.E. 413; Hudgins v. Wrights, (Va.) 1 Hen. & M. 134; Pegram v. Isbell, (Va.) 2 Hen. & M. 193; Vaughan v. Phebe, (Tenn.) Mart & Y. 4, 17 Am. Dec. 770; White v. Clements, (Ga.) 39 Ga. 232; and annotations at 15 ALR 2d 1443 and Ann. Cas. 1914 A, 462. The court, therefore, did not err in the admission of such evidence.

Several witnesses testified that A. W. Comstock, during his lifetime, had often stated that he was of Indian blood. Plaintiff in error says that admission of such testimony was erroneous and prejudicial, but no cases are cited in support of such position and we know of none.

The only authorities we have found hold that the declarations of a deceased person concerning his race are admissible. See in this connection 20 Am. Jur. 416, Evidence, § 475, and annotations at Ann. Cas. 1914 A. 462. We therefore find no merit in the second proposition.

As her third proposition, plaintiff in error contends that Bernard Beach failed to sustain the burden of proof imposed upon him by law and that upon a proper consideration and evaluation of the evidence as a whole judgment should have been for appellant. In other words, plaintiff in error contends that the trial court's finding

that Beach is of Indian blood is against the clear weight of the evidence. We do not agree.

Due to the voluminous character of the evidence presented by the parties it will not be delineated in detail herein. The testimony of approximately 70 witnesses was presented, either by deposition or in person, and numerous exhibits in the nature of photographs, letters, genealogical charts, death certificates, and various and sundry other documents, were introduced in evidence and placed in the record. Some 50 or more of these witnesses testified concerning the physical characteristics and appearance of A. W. Comstock, the grandfather of Bernard Beach, with particular reference to what they termed his Indian appearance. Some 37 witnesses testified that A. W. Comstock, during his lifetime, had on numerous occasions declared himself to be of Indian blood. At least 5 witnesses testified that Richard Emerson Comstock, the father of A. W. Comstock, had during his lifetime, declared that he was of Indian blood. The physical appearance of Richard Emerson Comstock, Homer Comstock (son of A. W. Comstock), and Wilmer Comstock (brother of A. W. Comstock), was detailed by a number of witnesses and several photographs were introduced. Eva Comstock, widow of A. W. Comstock, and three of their children, Cleo, Homer and Paul, all testified that A. W. Comstock was of Indian blood, as did Bernard Beach. The tradition or reputation in the family of Indian blood going back as far as Rhoda Emerson Comstock, the mother of Richard Emerson Comstock, was established by numerous witnesses. Various and sundry other corroborative items or events, too numerous to detail here, were testified to by various witnesses. It is true that there are inconsistencies between the testimony of the various witnesses. Many of these witnesses, however, were elderly persons testifying concerning events and conversations occurring 50 or more years ago. Such inconsistencies are naturally to be expected in such testi-

mony, and an absence thereof would reflect upon the credibility of such witnesses more than does their presence.

As above indicated, we have not undertaken to review in this opinion all of the evidence reflected by the record. We have, however, read and analyzed all of the proof with the aid of the comprehensive briefs presented by the parties. From our examination of the record we are impelled to conclude that the finding of the trial court that Bernard Beach is possessed of Indian blood is not against the clear weight of the evidence.

As her fourth proposition plaintiff in error complains of the admission in evidence of a written memorandum alleged to have been made by Leland E. Gorton prior to the taking of his deposition by the claimant. The making of the memorandum in question and its introduction in evidence, apparently came about in the following manner. Plaintiff in error took the deposition of Leland E. Gorton in the summer of 1952. About a year later the attorneys for Bernard Beach contacted Mr. Gorton and took his deposition. After this deposition was offered in evidence, these attorneys testified that they had seen Mr. Gorton and talked with him on two occasions and that Mr. Gorton wrote down a brief statement on the first occasion and on a later occasion wrote down a second brief statement on the same sheet of paper. This sheet of paper was offered in evidence, and the writing thereof is as follows:

> "About the year 1910—Henry Downer, son of Esther Emerson was visiting my grandmother Isbella Gorton and I remember her saying there was a strain of Indian blood in his line, that my grandfathers in his line *married an Indian squaw.*
>
> "About the year 1910 when I was 10 years old Henry Downer son of Esther Emerson Downer was visiting my grandmother, Isabella Gorton and I remember her saying that there was a strain of Indian blood in his line, that my grandfather's (Edward Gorton) grandfather *married an Indian Squaw.*"

We do not know upon what theory the above writing was admitted in evidence and we know of no theory under which it would be competent evidence or have any probative value. Mr. Gorton testified in detail concerning the subject matter of the statement and was thoroughly cross-examined thereon. It does not appear to us that the statement in question either adds to or detracts from such testimony in any way. Such being the case, the admission thereof, while error, could only be harmless error. Plaintiff in error does not suggest that she was in any way prejudiced by the admission of such statement or that the trial court relied thereon in reaching its conclusion. The admission in evidence of such statement therefore does not constitute reversible error. Travis v. McCully, 186 Okl. 378, 98 P. 2d 595; Liles v. Bigpond, 190 Okl. 112, 121 P. 2d 596.

As her last proposition, plaintiff in error asserts that the granting of a family allowance to Bernard Beach was wholly unwarranted both under the facts and under the law.

58 O.S. 1951, § 311, provides that the surviving spouse may continue to possess and occupy the homestead and that it is not subject to administration, and also provides that certain enumerated and described property shall be delivered to the surviving spouse.

58 O.S. 1951, § 312 provides that in addition to the property mentioned in section 311, supra, all property or money that is exempt by law from levy and sale on execution or other final process shall be allowed and set apart to the surviving spouse.

58 O.S. 1951, § 314 provides for an additional allowance for maintenance during the settlement of the estate, and reads as follows:

> "If the amount set apart as aforesaid be less than that allowed, and insufficient for the support of the

surviving spouse and children, or either, or, if there be no such personal property to be set apart, and if there be other estate of the decedent, the court may in its discretion make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary; or of administration."

There can be no doubt but that, under the foregoing statute, a family allowance may be paid to a surviving husband as well as to a surviving wife. Such statute as originally adopted (R. L. 1910, § 6331) authorized a family allowance for the support of widow and children. We held in the case of Stuart v. Schoonover, 104 Okl. 28, 229 P. 812, that the statute as then worded did not include the husband and that a family allowance was therefore not authorized for a surviving husband. The legislature shortly thereafter, and in 1925, amended such statute to its present form, above set out, so that it now refers to surviving spouse rather than widow, and obviously includes either husband or wife.

The power to grant a family allowance is purely and exclusively the creature of statute. The controlling statute is above set out. There is nothing therein indicating or providing that a family allowance to a surviving husband be upon any different basis or subject to different rules than such an allowance to a surviving wife.

We have held that a widow is entitled to an allowance out of the estate of her deceased husband for her support during administration, even though she has property of her own out of which she may support herself. In re Crane's Estate, 201 Okl. 354, 206 P. 2d 726. We have also held that the amount of allowance for support of deceased's family during administration rests largely within the discretion of the county court and of the district

court when tried de novo on appeal, and unless such discretion has been abused its action will not be disturbed, and that the abuse of judicial discretion which may be corrected on appeal is a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence. In re Crane's Estate, supra. We find no such abuse of discretion in the case at bar.

Plaintiff in error suggests that a widow is always entitled to a family allowance because of the legal duty of a husband to support the wife during his lifetime, whereas a wife is only under a legal duty to support the husband when he has no community or separate property and is unable from infirmity to support himself (see 32 O.S. 1951, § 3), and that a husband should therefore be entitled to a family allowance from the deceased wife's estate only when such deceased wife was under obligation to support such husband during her lifetime. The answer to this, of course, is that there is no statute to such effect, and since the right to a family allowance is purely statutory, we would, in order to announce such a rule, have to read it into the statute. We do not think this would be warranted. In re Crane's Estate, supra.

We find no error in the judgment and order appealed from and the same are therefore affirmed.

CORN, V.C.J., and DAVISON, JACKSON and CARLILE, JJ., concur; HALLEY, JOHNSON and BLACKBIRD, JJ., dissent.

February 18, 1958

The Clerk Is Hereby Directed To Enter The Following Orders: 36,581—Gladys Naomi Ware, etc., et al. v. Bernard E. Beach.

Petition for rehearing denied.

EARL WELCH
Chief Justice

March 11, 1958

The Clerk Is Hereby Directed To Enter The Following Orders: * * * 36,581—Gladys Naomi Ware, et al v. Bernard E. Beach. Application for leave to file second petition for rehearing denied.

EARL WELCH
Chief Justice

[Filed March 20, 1958]

Order Issuing Mandate But Staying the Enforcement Thereof

On this 20th day of March, 1958, for good cause shown the mandate of this court herein is ordered issued, but any enforcement of the mandate in the trial court is hereby ordered stayed until July 1, 1958, pending the filing of an appeal by plaintiffs in error in the Supreme Court of the United States, and if said appeal is filed on or before July 1, 1958, enforcement of the mandate shall be further stayed until such time as the Supreme Court of the United States renders a final decision herein, or until further order of this court.

It is further ordered that the nature of the judgment herein as such as not to require the filing of a supersedeas or stay bond on the part of the plaintiffs in error.

Done by order of the Court in Conference this 20th day of March, 1958.

EARL WELCH
Chief Justice

Mandate

THE SUPREME COURT OF OKLAHOMA:

To the Honorable Judge of the District Court of Osage County in said State of Oklahoma.

Whereas, the Supreme Court of the State of Oklahoma, did on the 25 day of June, 1957, render an opinion in the above entitled cause, appealed from the District Court of Osage County.

AFFIRMED

Now, therefore, you are hereby commanded to cause such Affirmance to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said opinion.

Witness, the Honorable Earl Welch, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma City, this 20 day of March, 1958.

(sgd) ANDY PAYNE, *Clerk*

By ETHEL C. HAMMETT
Ethel C. Hammett, *Deputy*

[Endorsed]:

Leave is hereby granted to file this 28 day of May, 1958.
EARL WELCH, *Chief Justice*

Motion for Clarification of Judgment

Comes now Gladys Naomi Ware, an incompetent person, by Johnnie Mohon, her legal guardian, and Johnnie Mohon, as legal guardian of Gladys Naomi Ware, an incompetent person, and respectfully moves the Court for a clarification of its judgment affirming the District Court of Osage County in the above matter, to set forth what action of the Court constitutes its "final judgment" referred to in Sec. 1257 of the U.S. Judicial Code (28 U.S.C. Sec. 1257) for the purposes of review in the Supreme Court of the United States.

In support of the foregoing motion, appellants respectfully show to the Court that an opinion was entered in this case on June 27, 1957, which concluded with the statement that "the judgment and order appealed from and the same are therefore affirmed." A petition for rehearing was timely filed pursuant to Rule 28, was set for oral argument and duly argued in January, 1958. On February 18th,

1958, after further consideration, the petition for rehearing was denied. Pursuant to Rule 29 of the rules of this Court, application for leave to file a second petition for rehearing was timely filed which was denied March 11th, 1958. Pursuant to Rule 33, the mandate of this Court then entered on March 20, 1958, pursuant to an order for mandate of the same date which provided that its enforcement should be stayed pending steps for review of the case in the Supreme Court of the United States by these appellants.

In connection with the preparation of a petition for writ of certiorari to be filed in the Supreme Court of the United States, counsel has encountered the decision in *Gypsy Oil Co.* v. *Escoe, etc.*, 275 U.S. 498, a *per curiam* decision of the Supreme Court of the United States denying a petition for certiorari to this court as out of time because not filed within three months of the denial of the first petition for rehearing in this Court, though filed within three months of the denial of the motion for leave to file a second petition for rehearing; that said decision does not show that the Supreme Court of the United States clearly established the date of the final judgment of this Court, from the entry of which the 90 days within which certiorari may be sought commences to run pursuant to Section 2101(c) of the United States Judicial Code (28 U.S.C. Sec. 2101(c)).

That it is the understanding of counsel for appellants that the statement in the opinion is not itself the entry of judgment in this Court, but that the final judgment of this Court equates with the date of the mandate the entry of which is specifically to be withheld under Rule 33 until the disposition of a motion for leave to file a second petition for rehearing or until the time therefor has expired; that it is not believed by counsel for appellants that the specific provisions for a motion for second petition for rehearing in this Court are intended to deny litigants the reviews authorized by Congress in the Supreme Court of the United

States as to federal questions disposed of by this Court; that it is the understanding of counsel for appellants that the rehearing practice in this Court has been deliberately adopted by the Court as a means of improving the administration of justice in this State, and that the purpose of the Court is to hold a final judgment in abeyance until opportunity has been accorded for the exhaustion of that petition for rehearing and motion for second petition for rehearing practice.

Accordingly, it is respectfully requested that the Court clarify the question of what constitutes its "final judgment" or the "entry" of its final judgment under 28 U.S.C. Section 1257(3) and Section 2101(c) of record in this case so that it may be presented to the Supreme Court of the United States in the event the petition for certiorari would not be out of time if filed within 90 days after March 20, 1958.

Respectfully submitted,

FRANK W. FILES
Frank W. Files

[Certificate of service omitted.]

Filed June 3, 1958

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Order Clarifying Date of Final Judgment

Now, on this 3rd day of June, 1958, this matter comes on for hearing before this Court upon the motion of the plaintiffs in error to clarify the date of the final judgment of this court in the above-styled cause.

That on June 25th, 1957, this court filed an opinion affirming the District Court of Osage County, Oklahoma, in the above-styled cause; that thereafter in accordance with rule 28 of this court a petition for rehearing was filed,

and said petition for rehearing was set for argument and such argument heard by this Court on the 7 day of January, 1958; and that thereafter on February 18th, 1958, the petition for rehearing was denied, and within due time allowed by this court an application for a second petition for rehearing was filed pursuant to rule 29 of this court; that the application for second petition for rehearing was denied by this Court on the 11th day of March, 1958;

That all steps authorized before the entry of a judgment had then been exhausted, and this Court as provided by rule [illegible] of this Court issued its judgment in said cause which is a part of its mandate dated March 20th, 1958.

That the judgment of this Court became final on March 20th, 1958, and such mandate was transmitted to the District Court of Osage County, Oklahoma, the trial court in said case; that said mandate was issued under specific rules of the practice of this court whereby the Clerk issues the mandate at the direction of the Chief Justice of the Supreme Court of Oklahoma; that the court considered an application to stay the enforcement of the mandate and final judgment of this court until July 1, 1958, pending the filing of an appeal by the plaintiffs in error wherein the Supreme Court of the State of Oklahoma in its conference of March 20th, 1958, and on said date, directed that the enforcement of said mandate be stayed.

It is, Therefore, Ordered that under the rules of practice before this Court that the judgment in the above-styled cause became final on the 20th day of March, 1958, said date being the date of the issuing of the mandate to the trial court in said cause.

Done by order of this Court in conference this 3rd day of June, 1958.

Earl Welch
Chief Justice

[Certification by Clerk omitted.]

SUPREME COURT OF THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 23rd, 1958, provided the statutory time has not already expired.

/s/ CHARLES E. WHITTAKER
Associate Justice of the Supreme Court of the United States.

Dated this 10th day of June, 1958.